

From: [Lori Cora](#)
To: [Koehl, Krista](#)
Cc: [Jennifer Woronets](#); [Chip Humphrey](#); [Eric Blischke](#); [Sean Sheldrake](#); [Kristine Koch](#)
Subject: Re: ARARs - Rivers and Harbors Act Section 10
Date: 04/29/2010 04:44 PM

Hello, Krista. Thanks for your expanded explanation of the regulatory basis for where within navigable waters Section 10 of the Rivers and Harbors Act applies. We agree that Section 10 requirements may be applied outside of the federal navigation channel. To date; however, EPA has viewed the primary requirement of Section 10 applicable to Superfund remedies as being the prohibition of creating obstructions to navigation. We do not view institutional controls, such as Restricted Navigation Area designations for no anchorage as being a Section 10 issue.

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▼ "Koehl, Krista" ---04/28/2010 04:30:36 PM---Lori, I am writing to follow-up on the question you had related to Section 10 of the Rivers and Harb

ARARs - Rivers and Harbors Act Section 10

Koehl,
Krista to: Lori Cora

04/28/2010
04:30 PM

Cc: "Jennifer Woronets"

Lori,

I am writing to follow-up on the question you had related to Section 10 of the Rivers and Harbors Act in your February 10, 2010 letter regarding the Portland Harbor ARARs.

In LWG's February 1, 2010 communication, we stated that the Rivers and Harbors Act is not necessarily limited to the navigation channel. Application is broader in that it prohibits the creation of any obstruction that would impede navigation and commerce, generally determined by the federal and state harbor line (or wharf line). You asked whether we had a statutory or regulatory citation to support the statement that the Rivers and Harbors Act can have application outside the federal navigation channel. The relevant statute and regulation is described below.

Rivers and Harbors Act, Section 10, 33 USC § 403 has three components:

1. "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;"
2. "and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army;" (emphasis added)
 - "Structure" is defined broadly and includes "any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction." 33 CFR § 322.2(b) (emphasis added).
3. "and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."
- "navigable water of the United States" means "generally...those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have

been used in the past, or may be susceptible to use to transport interstate or foreign commerce.” 33 CFR § 322.2(a).

As noted above, Section 10 is not limited to application within only the navigation channel itself. The navigation channel is the area authorized by Congress to be maintained by the Army Corps of Engineers to a specific depth. Other areas of the river are used for transportation and commerce (e.g. a vessel must move from the navigation channel in the center of the river to a berth or dock). Also, the physical features of areas adjacent to the navigation channel can impact the ability of a vessel to move through the navigation channel. The analysis under Section 10 should therefore be broader, and ask whether the permanent feature of an alternative (like a cap, CAD or CDF) impedes the navigable capacity of the river. This is particularly true given that EPA often requires that caps be designated as Restricted Navigation Areas by the U.S. Coast Guard. Both the navigation channel and the harbor line would be relevant in such an analysis. As you can see from the attached figure, these lines may vary in certain locations within the river.

Let me know if you have any other questions.

Thanks,

Krista

Krista I. Koehl

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****Please Note: We've Moved and My Address and Telephone Number Have Changed****

[attachment "HL_Harb_map_set.pdf" deleted by Lori Cora/R10/USEPA/US]